# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No.

NEW YORK AND CUBA MAIL STEAMSHIP COMPANY
Petitioner
(Libellant-Appellee)

AGAINST

THE CONTINENTAL INSURANCE COMPANY OF THE CITY OF NEW YORK
Respondent
(Respondent-Appellant)

## BRIEF IN SUPPORT OF PETITION

### FIRST POINT

**The Circuit Court of Appeals was in error in applying to this contract suit principles which as concern privity would be applicable only in a limited liability proceeding under the statute.**

The Circuit Court of Appeals said: "There seem to be no explicit decisions to guide us as to the meaning of the crucial words in the policy" (R. 1369). And it recognized that "the analogy between a statutory provision for limited liability and a contract by a paid insurer to relieve its promisee of loss should not be pressed too far" (R. 1369). Nevertheless, in reversing the District Court, the Circuit

Court of Appeals relied upon privity decisions under the limited liability statute which are applicable only in a proceeding under that statute.

Both the Harter Act of 1893 and the Carriage of Goods by Sea Act of 1936 exempt the carrier from cargo liability for negligence in management and navigation. Therefore, P. & I. protection in respect of cargo is only required against the negligence of shore personnel or negligence of ship's personnel in care and custody. The regular marine policies take care of collision damage to other vessels, and so such danger is not the subject of the P. & I. policy. The Fire statute, R. S. 4282 (46 U. S. C. 182) exempts the carrier from liability for loss of cargo by fire, which exemption includes losses due to negligent custody or other negligence, unless the fire be shown due to the carrier's design or neglect.

It is therefore apparent that the policy as construed by the Circuit Court of Appeals would afford substantially no protection against cargo claims except in relatively minor cases.

Contracts of insurance should be interpreted and applied broadly to afford to assureds the benefits which alone justify such insurance. Insertion of the privity clause in the policy should not have been given any special significance other than as a specific *caveat* in the policy against matters (*i. e.*, fraud, broadly speaking) which would on fundamental principles constitute a defense even without such specific statement. Certainly it should not have been assimilated to the privity clause in R. S. 4283.

It is appropriate to say of the insurance policy in suit, as was said by this Court in respect of the Clayton Act, *United States* v. *Hutcheson*, 61 Sup. Court Rep. 463, 467-8:

"Such legislation must not be read in a spirit of mutilating narrowness. On matters far less vital and far less interrelated we have had occasion to point out the importance of giving 'hospitable scope' to Congressional purpose even when meticulous words are lacking. Keifer & Keifer v. Reconstruction Finance Corporation, 306 U. S. 381, 391, 59 S. Ct. 516, 519, 83 L. Ed. 784, and authorities there cited. The appropriate way to read legislation in a situation like the one before us, was indicated by Mr. Justice Holmes on circuit: 'A statute may indicate or require as its justification a change in the policy of the law, although it expresses that change only in the specific cases most likely to occur to the mind. The Legislature has the power to decide what the policy of the law shall be, and if it has intimated its will, however indirectly, that will should be recognized and obeyed. The major premise of the conclusion expressed in a statute, the change of policy that induces the enactment, may not be set out in terms, but it is not an adequate discharge of duty for courts to say: We see what you are driving at, but you have not said it, and therefore we shall go on as before.' Johnson v. United States, 1 Cir., 163 F. 30, 32, 18 L. R. A., N. S., 1194."

In *Warner* v. *Goltra,* 293 U. S. 155, this Court held that the master of a tugboat should be regarded as a seaman within Section 33 of the Merchant Marine Act of 1920. Mr. Justice Cardozo said, at 156, in reference to *International Stevedoring Co.* v. *Haverty,* 272 U. S. 50:

"None the less, verbal niceties were bent to the overmastering purpose of the act to give protection to workers injured upon ships."

The words of the statute were understood and applied in contemplation of its remedial purpose. So should the words of this insurance policy be understood, to make its protective purposes effective.

## SECOND POINT

**Petitioner's marine superintendent (Torresson) was not an officer or a managing officer of petitioner under respondent's protection and indemnity policy of insurance.**

The Circuit Court of Appeals held that Torresson was a managing officer (R. 1369-71) and condemned petitioner because of Torresson's assumed negligence in respect of various instances of statutory violations at sea which took place on the *Morro Castle*. In other words, the Circuit Court of Appeals has required petitioner to establish affirmatively a complete negative of privity on the part of Torresson, an employee, as a condition of receiving any benefits under respondent's policy. This was notwithstanding that on all the proofs the District Judge had found that neither Cabaud, the managing officer, nor Torresson, the marine superintendent, was in fault or privity to the statutory violations or liabilities following from the fire (Finding 11, R. 1335).

If it be assumed that there was neglect on the part of Torresson which would have foreclosed petitioner from limiting liability under the statute, that would not justify forfeiture of petitioner's right to recover under the policy. We do not question that under the limitation statute the privity of certain employees, not "officers", may constitute privity on the part of the corporation. See *The Erie Lighter 108*, 250 Fed. 490; *In re Spencer Kellogg & Sons, Inc.*, 285 U. S. 502. However, it does not follow that such employees are promoted to be officers of the corporation merely because privity on their part may prevent limita-

tion under the limitation statute. It could only be by some neglect of the assured (petitioner) that a liability could arise at all as a basis for claim under the policy. Clearly Torresson's assumed neglect, as referred to by the Circuit Court of Appeals, was not as a *managing officer*, but as a mere employee agent, and it could not possibly save the respondent from liability according to the express and deliberate language of the policy. In brief, the Circuit Court of Appeals could reach its decision only by elevating Torresson, an employee, to the status of "managing officer".

This error which found its way into the opinion of the Circuit Court of Appeals can be traced to the brief filed by respondent in that Court. There respondent bracketed Torresson with Cabaud and argued that Torresson was a managing officer. This was directly in the teeth of what transpired upon the trial* in the District Court, where this very point was raised and counsel for the respondent did not even contend that Torresson was an officer, and the District Court said:

"The Court knows that the witness Mr. Keating described as an officer (Torresson) was not an officer" (R. 645).

In order that there may be no misunderstanding as to this we set forth the remarks of counsel and Court on this issue (R. 644):

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* Torresson testified:

"Q. Mr. Torresson, are you an officer of the corporation? A. No, sir, I am not.

Q. Were you in 1934? A. No, sir, I was not" (R. 658).

There is no evidence whatever in the record contradictory of this.

"Mr. Clark: If your Honor please, Mr. Keating said 'to the officers of the company, including yourself.' Well, I don't know whether he intends to make this witness an officer in his question, referring to him as an officer.

Mr. Keating: Well, I will leave out that word. He was managing agent.

Mr. Clark: Make him just what his testimony shows, marine superintendent. I object to Mr. Keating making him an officer by putting that word in his questions.

The Court: Mr. Clark, I think you are right. As a matter of fact merely because a lawyer characterizes a man a president or officer of the corporation does not make him so.

Mr. Keating: Of course so.

The Court: And I think any judge in writing an opinion would regard the fact rather than the mere question of counsel.

Mr. Keating: I think it appears clearly what this man's duty was.

The Court: He was marine superintendent.

Mr. Keating: Yes.

Mr. Clark: I can also visualize, your Honor, Mr. Keating's brief where he says he was an officer of the corporation and quotes the question and the witness' answer and so forth. He will say he admits he is an officer.

The Court: That wouldn't be a good point. I don't think that would rest on very firm foundation. The Court knows that the witness Mr. Keating described as an officer was not an officer."

The principle that the construction most favorable to the assured as against the assurer preparing the policy was recently reasserted by this Court in *Stroehmann* v. *Mutual Life Ins. Co.*, 300 U. S. 435, 439, where it was said:

"In *Mutual Life Insurance Co.* v. *Hurni Packing Co.*, 263 U. S. 167, 174, this Court said: 'The rule is settled that in case of ambiguity that construction of the policy will be adopted which is most favorable to the insured. The language employed is that of the company and it is consistent

with both reason and justice that any fair doubt as to the meaning of its own words should be resolved against it.' See *Royal Insurance Co.* v. *Martin*, 192 U. S. 149, 162, 165; *Bergholm* v. *Peoria Life Ins. Co.*, 284 U. S. 489, 492."

See also *American Surety Co.* v. *Pauly*, 170 U. S. 133, 144.

These decisions forbade that the marine superintendent, a mere agent of petitioner, should be transformed into a managing officer for the purpose of attributing fault or privity to petitioner, whether or not he had managerial duties assigned to him by Vice-President Cabaud, managing officer.

In *The Galileo*, 287 U. S. 420, 425, a case under the Fire statute, Mr. Justice Brandeis referred to "negligence of its *managing officers or agents*" (italics ours) thus distinguishing between a "managing officer" and a "managing agent."

The word "officer" has a definite and distinctive meaning—one holding a position created by the charter or by-laws and elected by the board of directors. An employee or agent is selected by officers. "Agent" also has a distinctive meaning; there is no doubt that an employed marine superintendent is an agent, and may have duties which constitute him a managing agent, and that his negligence may prevent the corporation from limiting its liability, but this does not make such marine superintendent an officer of the corporation. The limitation statute, R. S. 4283 makes no classification in respect of the persons whose fault when imputed to the owner will deprive him of the benefits of the statute. But the *policy* did make such a classification. If respondent desired to class managing agents with managing officers (as it did *after* the fire) respondent should have so bargained and so specified in its contract of insurance.

## THIRD POINT

**The Circuit Court of Appeals was in error in charging petitioner with a burden of proof not stipulated for or contemplated by the policy which subjected petitioner to the burden, impossible in any event to discharge, to prove the negative of all charges that could be made against it in respect of privity.**

In *La Bourgogne,* 210 U. S. 95, this Court refused to uphold a contention there made for claimants in a limited liability proceeding (97), that an allegation that the loss occurred without privity or knowledge of the petitioner could not be:

"established without proving the negative of any matter of privity or knowledge that is put in issue" and that "the petitioner must prove not only the ultimate fact, but also such subsidiary facts as may be necessary to found the conclusion that is to be established."

Nothing in the policy specified or suggested that petitioner could be subjected to a burden of proof in the negative sense, *i.e.,* that no recovery could be had unless petitioner should affirmatively establish the negative of every contention set up by respondent as to why its liability should be avoided. That is to say, the Court below required that petitioner prove that anything that Cabaud or Torresson did or failed to do could not have contributed to the liability of petitioner. Interpreting the policy in that sense converted it into no insurance at all, and deprived petitioner of the protection for which petitioner paid premiums to respondent.

In *Waters* v. *Merchant's Louisville Insurance Company*, 11 Peters 213, the question was whether the insurance against risk of fire would be defeated when the fire was remotely caused by negligence, there being no exception of negligence in the policy. The language of Mr. Justice Story there (11 Peters 221-2) is apposite here in respect of the proof of negatives imposed on petitioner by the Circuit Court of Appeals. He said:

"If negligence of the master or crew, were under such circumstances a good defence, it would be perfectly competent and proper to examine on the trial any single transaction of the whole voyage, and every incident of the navigation of the whole voyage, whether there was due diligence in all respects, in hoisting or taking in sail, in steering the course, in trimming the ship, in selecting the route, in stopping in port, in hastening or retarding the operations of the voyage; for all these might be remotely connected with the loss. If there had been more diligence, or less negligence, the peril might have been avoided or escaped, or never encountered at all. *Under such circumstances, the chance of a recovery upon a policy for any loss, from any peril insured against, would of itself be a risk of no inconsiderable hazard.* (Italics ours.)

This is not all: we must interpret this instrument according to the known principles of the common law. It is a well established principle of that law, that in all cases of loss we are to attribute it to the proximate cause, and not to any remote cause".

Definitely opposing the position taken by the Circuit Court of Appeals are the provisions of the Carriage of Goods by Sea Act of April 16, 1936, 46 U. S. C. 1304, granting exemptions to carrier and ship from liability for losses from various specified causes. Sec. 4(2) (q) provides:

"Any other cause arising without the actual fault and privity of the carrier and without the fault or neglect of

the agents or servants of the carrier, but the *burden of proof* shall be on the person claiming the benefit of this exception to show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage." (Italics ours)

This is in contrast with exemption (b) in the same section, as follows:

"Fire, unless caused by the actual fault or privity of the carrier;".

It is also in contrast with Sec. 4 (3) which reads:

"The shipper shall not be responsible for loss or damage sustained by the carrier or the ship arising or resulting from any cause without the act, fault, or neglect of the shipper, his agents, or servants."

Sec. 4 (1) also emphasizes the contrast, as follows:

"Neither the carrier nor the ship shall be liable for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier to make the ship seaworthy. * * *. Whenever loss or damage has resulted from unseaworthiness, *the burden of proving* the exercise of due diligence shall be on the carrier" etc. (Italics ours)

Respondent's P. & I. policy cannot reasonably be interpreted and applied less favorably to petitioner than the laws, passed by Congress to protect shippers, provide for as matter of course.

## FOURTH POINT

**The Circuit Court of Appeals erred in holding that the failure of marine superintendent Torresson to examine the logs of the Morro Castle in respect of division of watches and drills, and the failure of managing officer Cabaud either to examine the logs himself or to supervise Torresson in that regard, constituted actual fault or privity on the part of petitioner as concerned the liabilities for which it sought reimbursement.**

The U. S. Steamboat Inspectors regularly examined the log books and found them satisfactory. The District Judge found that examination of the logs would not have shown whether the law as to division of watches was being violated on shipboard or not (R. 1335). It was not a violation of any statute or regulation for the master not to enter in the log the numbers or names of men on watch. Keeping of the logs and control of the logs were for the master under R. S. 4290 (46 U. S. C. 201-3).

Furthermore, there is no dispute that the erroneous division of watches was made upon orders of the master, nor that proper written instructions as to the statute had been given the master by Torresson (Finding 11, R. 1335). The District Court found that neither Torresson nor Cabaud knew of the master's violation of these instructions (R. 1335).

In event of damage on or relating to the ship, and possibly involving repair, it would have been natural for Torresson to examine the log of the particular voyage involved to find out what contemporaneous relevant information might be noted therein. Likewise, another sub-

ordinate, perhaps in the Claim Department, might well examine the log for comparable information in relation to claims asserted for damage to another vessel, for personal injury or for damage to cargo etc. But aside from events of this general nature, and in the absence of any incident calling for particular attention, it is not apparent why Torresson or any other subordinate (much less Cabaud) should have scrutinized the logs.

In *La Bourgogne,* 210 U. S. 95, the contention was made for claimants that because logs as demanded by them had not been produced by petitioner, and because it might be assumed that such logs if produced would disclose knowledge in the petitioner of a practice of immoderate speed in fog (claimed to amount to "privity or knowledge") therefore limitation of liability should be denied. This Court rejected that contention. It appeared in that case that the petitioner had promulgated regulations requiring its masters to comply with the International Rules. This Court said 210 U. S. at 126-127:

"The petitioner having shown the promulgation of regulations for the conduct of its business, which exacted a compliance by the captains of its vessels with the international rules, we think the burden of proving that the rules were not promulgated in good faith or that a willful departure from their requirements was indulged in, and was brought home to or countenanced by the petitioner, was cast upon the claimants, and that the court properly held that that burden was not sustained by the evidence."

Again, the Circuit Court of Appeals disregarded the finding of the District Court as to drills held on board the *Morro Castle,* remarking that "there are not the proper detailed logbook records of whatever drills occurred" (R. 1375). Although the District Court found that petitioner

was not privy to the failure of the ship's officers to comply with the statutes and regulations as to fire and boat drills (Finding 13, R. 1338), the Circuit Court of Appeals, erroneously stating that Mr. Mooney, president of petitioner company, "saw one drill but was not called" (R. 1375), decided that "this affirmatively indicates fault and privity" (R. 1376). There is no evidence whatever that Mr. Mooney witnessed a drill at any time, or was even on deck at any time a drill was held. The District Court so found (R. 1318, 1337-8).

It is true that detailed entries were not made in the ship's logs *i. e.* the entries state the day of the month, but not the length of time of the drill, number of boats swung out, number of lengths of hose used and the condition of all fire and life-saving apparatus. However, writing out a detailed entry in the log does not make a perfect drill, and the converse is equally true. Because the entry in the log reads merely "held fire and boat drill", this does not mean that the drill was not properly held. As was proved on the trial, although the details do not appear in the log, it was established beyond doubt that they were attended to (see testimony of the U. S. Steamboat Inspectors Moffat and Martin, Appendix C).

Furthermore, responsibility for drills is placed by the statute and regulations directly upon the master and the U. S. Steamboat Inspectors. Cabaud, being aware of the quarterly inspections and the master's monthly reports under oath, was, in the absence of complaint, entitled to rely upon these as evidence that the drills were properly conducted and the crew properly trained. Nor is it true, as contended by respondent that the log entries as to drills are required to enable the managing officers of the owner

to check up on the fire and boat drills. The purpose is to enable the U. S. Steamboat Inspectors to check up on the performance of these duties by the ship's officers (See Appendix C, testimony of Moffat and McLintock, R. 676-80 and 761-66). In Rule V-18 of the regulations, the paragraph requiring log entries of drills immediately follows a paragraph setting forth "the duty of the Inspectors" and immediately precedes a paragraph requiring the master to make monthly reports of the drills.

**Duty of U. S. Steamboat Inspectors* to see that requirements as to drills be carried out**

The regulations provide that it shall be the duty of the U. S. Steamboat Inspectors to require the officers and crew to perform the drills and discipline the crew in the presence of the Inspectors at intervals sufficiently frequent to assure the Inspectors by actual observation that the requirements are complied with. That the Inspectors carried out the requirements of the regulations is clear from their testimony and the District Court so found (see testimony, Appendix C, Finding 13, R. 1337).

Cabaud knew that the Inspectors were required to satisfy themselves by actual observation that the requirements of the statute and regulations were being complied with (R. 980). Notwithstanding the direct testimony to this effect and the finding of the District Court, the Circuit Court of Appeals concluded that improper drills "affirmatively indicates fault and privity" (R. 1376), a clear *non sequitur* because, in order to show fault and privity, knowledge of

* Sometimes referred to as "Local" Inspectors.

improper drills must be brought home to petitioner, which was not done. Indeed, the Circuit Court of Appeals thought it important that Cabaud saw an incomplete drill "while at sea" (R. 1375-6). This was fully explained although the Court overlooked the explanation. The Court set forth the explanation as follows:

"Cabaud saw an admittedly incomplete one (drill) while at sea but says Captain Willmott explained that the boats were damaged" (R. 1375-6).

The proved explanation was that because boats had *previously* been damaged in lowering at sea he (Willmott) was lowering the boats and exercising the crew at Havana (R. 721). There can be no criticism of this which was in accordance with the Statute (R. S. 4488, 46 U. S. C. 481), which provides that drills should be held at least one a week "either in port or at sea". And the log shows that the boats were lowered at Havana on May 22, 1934 (Ex. J-3, R. 1358).

**Master's monthly report of drills and condition of vessel and equipment**

The regulations require the master of passenger vessels to report the day and date of exercise and drill of the crew, the condition of the vessel and her equipment. This report is required to be made to the U. S. Inspectors at the port where the vessel was last inspected. There is no doubt that these reports were made monthly by the *Morro Castle's* master to the Inspectors. The available reports have been marked as one exhibit (Ex. 54, R. 877). Nor can there be any doubt that any failure of the master to make the reports

or any inadequacy disclosed by the reports would inevitably have brought complaint to the shipowner from the Inspectors. There is no suggestion that any complaint was made by the Steamboat Inspectors.

## FIFTH POINT

**The decision of the Circuit Court of Appeals is contrary to the established rule of the Circuit Courts of Appeals that on questions involving the weight of the evidence the decision of the District Judge, who heard and saw the witnesses, will not be disturbed unless clearly erroneous.**

The fact findings of the District Judge under Admiralty Rule 46½ that on all the evidence petitioner was free from actual fault or privity in any sense contemplated by the policy were entirely disregarded by the Circuit Court of Appeals. In so doing the Court disregarded not only its own well established admiralty rule, but also that of the other Circuit Courts of Appeal. In *McAllister Brothers, Inc.* vs. *Pennsylvania R. R. Co.*, 118 F. (2d) 45 (C. C. A. 2), decided March 3, 1941, the same Court said:

"The only question on this appeal is the sufficiency of the evidence to support the findings on which that conclusion was based. Though the appeal brings the issues before us *de novo*, yet the well settled rule is that the court's findings must stand unless they are clearly against the preponderance of the evidence. City of Cleveland v. McIver, 6 Cir., 109 F. 2d 69; The A. G. Brower, 2 Cir., 220 F. 648; The City of Augusta, 1 Cir., 80 F. 297."

In the Ninth Circuit the Circuit Court of Appeals in *The Andrea F. Luckenbach*, 78 F. (2d) 827, 828, said:

"* * * The well-established rule is applicable that the decision of the trial court in admiralty cases upon contro-

verted questions of fact will not be disturbed by the appellate court unless clearly against the weight of the evidence. * * * "

To the same effect are: *Philippine Sugar C. Agency* v. *Kokusai Kisen, etc.*, 106 F. (2d) 32, 35 (C. C. A. 2); *The James Watt*, 61 F. (2d) 783, 785 (2 C. C. A.); *Merchants' and Miners' Transp. Co.* v. *Nova Scotia S.S. Corp.*, 40 F. (2d) 167, 168 (1 C. C. A.); *Tomkins Cove Stone Co.* v. *Bleakley Transp. Co.*, 40 F. (2d) 249, 252 (3 C. C. A.); *Virginia Shipbuilding Corp.* v. *United States*, 22 F. (2d) 38, 51 (4 C. C. A.).

## SIXTH POINT

**The Circuit Court of Appeals erred in failing to determine the propositions raised by petitioner's cross-assignments of error, and in failing to grant petitioner a decree for all its damages and all its expenses in accordance with the provisions of the policy, without limitations implied from Conclusions 5, 6 and 7 of the District Court.**

Petitioner filed cross-assignments of error (R. 1355-7) directed principally to Judge Goddard's conclusions of law 5, 6 and 7 (R. 1341). These conclusions conceivably limit the full recovery permitted by the policy. Finding 2, R. 1330-1, specifies the recovery provisions—which include not only liability for loss of life and personal injury, and for loss or damage to property, but also liability for hospital, etc. expenses, and costs, charges and expenses reasonably incurred and paid by assured in defense against liabilities insured against.

At the trial it was stipulated that a settlement had been made and paid by petitioner, covering all its liabilities to claimants; that it had incurred and paid various disbursements and legal expenses in connection with the claims; and that the settlement disbursements and legal expenses were to some extent proper items of damage in event recovery was allowed. The stipulation provided also that consideration of the amount of any recovery by petitioner should be postponed until after the trial on the merits (Stipulation, R. 25).

The settlement of claims was negotiated with a Committee of Proctors representing all claimants. See the decision of the Circuit Court of Appeals in *Hyman* v. *Pottberg's Ex'rs,* 101 F. (2d) 262.

It was not in order for the District Judge to make any conclusions which might have the effect of prohibiting the Commissioner from dealing with all of petitioner's claims in respect of damages, or of raising a controversy before him concerning his authority. Petitioner should not be denied opportunity to prove before the Commissioner that the full settlement of $890,000 made by it was no more than the amount of petitioner's liabilities.

The policy provided that petitioner should "take such steps to protect his (and/or the assurers') interests as would reasonably be taken in the absence of this or similar insurance" (Finding 2, R. 1331). Inasmuch as respondent did not coöperate in the matter of settlement even to the extent of expressing an opinion thereon when requested, but "repudiated all liability under said policy with respect to the aforesaid matters" (Finding 17, R. 1339), respondent should not be permitted to raise any objection to the

full amount of the settlement. Petitioner had no alternative but to settle. Reasonable compromises in certain situations are entirely proper, and liabilities are established thereby. See *Kokusai, etc.* v. *Columbia Stevedoring Co., Inc.*, 23 F. Supp. 403, 406, aff'd 100 F. (2d) 1016.

Petitioner's right to show the complete situation concerning damages before the Commissioner is the more apparent because the policy distinctly provided coverage in respect of crew and cargo claims and the expenses of defense thereto.

Whatever might have been the result of further defense in the statutory limitation proceeding as against crew and cargo claims, the expenses incurred by petitioner up to the time of settlement would not have been lessened by further defense, but would have been increased. Since the policy covered the expense of defending cargo and crew claims as well as all others, the expenses are all recoverable in any event and in full (not on any limitation basis), irrespective of whether it would have turned out that there was no legal liability, or only limited liability, or full liability upon these claims, or any others.

The District Court failed to make any conclusion directed to recovery of petitioner's expenses of one kind and another, notwithstanding that the same are distinctly specified as covered by the policy. A conclusion was proposed by petitioner (but not granted) as follows (R. 1356):

"5. Libellant became entitled to recover from respondent under its protection and indemnity policy of insurance No. C2336, all such loss and/or damage and/or expense as libellant became liable to pay and did pay of the descriptions set forth in said policy, together with interest and costs."

Such a conclusion would not prejudice respondent, because petitioner's recovery thereunder could not exceed the amount of its liabilities and expenses insured by the policy.

## LAST POINT

**It is respectfully submitted that the writ should be granted and the decision of the Circuit Court of Appeals be reversed, and that the decree of the District Court be so modified as to grant petitioner its full damages according to the settlement made with the claimants, together with its expenses and interest and costs.**

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New York City
April 24, 1941.